No. 01-866

(3)

Supreme Court, U.S.
FILED
JAN 10 2002

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
D/B/A TIME WARNER CABLE,

Petitioner,

—v.—

NATIONAL SATELLITE SPORTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT NATIONAL SATELLITE SPORTS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARCUS W. CORWIN
SKIP M. KLAUBER
MARCUS W. CORWIN PA
7777 Glades Road, Suite 208
Boca Raton, Florida 33434
(561) 482-3636

MICHAEL J. DELL
Counsel of Record
LAUREN FREEMAN-BOSWORTH
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Respondent

38 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. When a magistrate judge orally grants summary judgment that a company that, by contract, had rights only to a closed circuit television feed and not to an HBO feed, and indeed was contractually barred from suing for piracy with respect to the HBO feed, lacked standing to sue under 47 U.S.C. § 605(a) for piracy of the HBO feed, and the defendant did not even argue that the action would be barred in the absence of that contractual prohibition, and there is no basis to believe that the magistrate judge would have so held, and any such holding would not have been necessary to the decision, should the company be collaterally estopped from bringing a different lawsuit under 47 U.S.C. § 605(a) against the same defendant for divulging the contents of a different communication when an entirely different contract expressly gave the company the right to seek legal redress for that conduct.

2. Whether a company with a proprietary interest in a communication has standing to bring an action under 47 U.S.C. § 605 against a cable operator that divulged the contents of the communication without authorization and in derogation of that proprietary interest.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent National Satellite Sports, Inc. states that it has no parent corporation nor is there any publicly held company owning ten percent or more of its stock.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 9

I. *Coach's Corner* does not estop NSS from pursuing this litigation. 9

II. The Sixth Circuit correctly applied the plain language of § 605, and its holding is entirely consistent with both the legislative history and the caselaw on § 605. 21

CONCLUSION. 30

TABLE OF AUTHORITIES

CASES

Arab African Int'l Bank v. Epstein, 958 F.2d 532 (3d Cir. 1992), *rev'd on other grounds*, 10 F.3d 168 3d Cir. 1993) 14 n.4

Baker Elec. Co-op v. Chaske, 28 F.3d 1466 (8th Cir. 1994) 14 n.4

Bank of Guam v. Wiseman, No. 87-1799, 1990 WL 140521 (9th Cir. Sept. 27, 1990) 19

Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313 (1971) 12-13

Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) 16

Comair Rotron, Inc. v. Nippon Densan Corp., 49 F.3d 1535 (Fed. Cir. 1995) 15 n.4

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986) 20

General Instrument Corp. v. Nu-Tek Elecs. Mfg., No. 93-CV-3854, 1996 WL 442790 (E.D. Pa. July 31, 1996), *aff'd*, 197 F.3d 83 (3d Cir. 1999) 24

Graver Tank & Mfg. Co. v. Linde Air Prods., 336 U.S. 271 (1949) 4 n.1

Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970) 20

Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. 1981) 14 n.4

Hydranautics v. FilmTec Corp.,
204 F.3d 880 (9th Cir. 2000) 10

Irving Nat'l Bank v. Law,
10 F.2d 721 (2d Cir. 1926) 19-20

Joe Hand Promotions v. D.M.B. Ventures, Inc.,
No. CIV A 93-2656, 1995 WL 328399 (E.D. La. May 31, 1995) 27-28

Joe Hand Promotions v. Rennard St. Enters.,
975 F. Supp. 746 (E.D. Pa. 1997) 24, 26

Johnson v. Watkins,
101 F.3d 792 (2d Cir. 1996) 13

Leal-Rodriguez v. INS,
990 F.2d 939 (7th Cir. 1993) 19

MediaOne, Inc. v. E&A Beepers & Cellulars,
43 F. Supp. 2d 1348 (S.D. Fla. 1998) 24

Nagle v. Alspach,
8 F.3d 141 (3d Cir. 1993) 16

Natural Res. Def. Council v. NRC,
216 F.3d 1180 (D.C. Cir. 2000) 17 n.6

Overseas Motors, Inc. v. Import Motors Ltd.,
375 F. Supp. 499 (E.D. Mich. 1974),
aff'd, 519 F.2d 119 (6th Cir. 1975) 12

Peabody Coal Co. v. Spese,
117 F.3d 1001 (7th Cir. 1997) 14 n.4

Richmond Screw Anchor Co. v. United States,
275 U.S. 331 (1928) 17 n.6

Ritter v. Mount St. Mary's College,
814 F.2d 986 (4th Cir. 1987) 14 n.4

Schwager v. Fallas (In re Schwager),
121 F.3d at 177 15

Smith v. Cincinnati Post & Times-Star,
475 F.2d 740 (6th Cir. 1973) 30 n.14

Staatsburg Water Co. v. Staatsburg Fire Dist.,
527 N.E.2d 754 (N.Y. 1988) 16

Television Signal Corp. v. Chapman,
No. C92-3732, 1993 WL 69179
(N.D. Cal. Mar. 3, 1993) 26

Territory of Guam v. Borja, 93 F.2d 914
(9th Cir. 1992), *amended* (Jan. 20, 1993)..... 19

That's Entertainment, Inc. v. J.P.T., Inc.,
843 F. Supp. 995 (D. Md. 1993) 28-29

Time Warner Cable v. Freedom Elecs.,
897 F. Supp. 1454 (S.D. Fla. 1995) 24

Time Warner Cable v. Googies Luncheonette, Inc.,
77 F. Supp.2d 485 (S.D.N.Y. 1999) ..... 25 n. 11

Time Warner Cable v. M.D. Electornics, Inc.,
101 F.3d 278 (2d Cir. 1996) 25 n.11

Time Warner Cable v. Taco Rapido Rest.,
988 F. Supp. 107 (E.D.N.Y. 1997) .....25 n. 11, 26 n.12

Time Warner Entertainment v, Worldwide Electronics, L.C.,
50 F. Supp.2d 1288 (S.D.Fla. 1999).25 n.11

Turney v. O'Toole,
898 F.2d 1470 (10th Cir. 1990) 14 n.4

In re Westgate-Cal. Corp.,
642 F.2d 1174 (9th Cir. 1981) 18

Williams v. Ward,
556 F.2d 1143 (2d Cir. 1977) 20

Yamaha Corp. of Am. v. United States,
961 F.2d 245 (D.C. Cir. 1992) 19

STATUTES

47 U.S.C. § 605 .....passim

Fed. R. App. P. 38 16

Ninth Circuit Local Circuit Rule 36-3(a) 19

MISCELLANEOUS

1B James W. Moore, *Moore's Federal Practice* .443.10

16 Wright & Miller, *Federal Practice & Procedure* 1527
(1990) 4

Restatement (Second) *Judgments* § 27
(1982) 15, 17-18, 19, 20 n.8

Cable Communications Policy Act of 1984,
H.R. Rep. No. 98-934, *1984 U.S. Code*
Cong. & Admin. News 4655 22

P.L. 100-67, *Trademark Law Revision Act of 1988 -*
Satellite Home Viewer Act of 1988,
H.R. Rep. No. 887(11), *1988*
U.S. Code Cong. & Admin. News 5577, 5658 22

PRELIMINARY STATEMENT

National Satellite Sports, Inc. ("NSS") respectfully asks this Court to deny the petition of Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable ("TW") for a writ of certiorari because the petition does not raise any issue meriting this Court's review.

TW asserts that this appeal presents this Court with an opportunity to resolve a conflict in the Circuits as to whether a district court holding that is based on two alternative grounds is a basis for collateral estoppel as to both grounds. That assertion is incorrect and the unique facts of this case do not squarely present that issue, for several reasons. First, the magistrate judge did not clearly make the alternative holding as to which TW seeks to estop NSS and two other prerequisites of estoppel -- an identity of issues and a full and fair opportunity to be heard -- are not present. TW argues that a magistrate judge in a prior lawsuit orally granted summary judgment that NSS did not have standing under 47 U.S.C. § 605(a) to sue TW for wrongfully transmitting an HBO network feed to a commercial establishment both (a) because TW's own subsidiary's contract that governed NSS' rights to distribute the event to commercial establishments by closed circuit ("CCTV") telecast expressly precluded NSS from bringing a piracy action with respect to the HBO network feed and (b) because 47 U.S.C. § 605 supposedly barred such standing even in the absence of such a contractual bar. However, TW did not even argue in its summary judgment motion in that prior proceeding that NSS would not have had standing to sue for the misuse of the HBO network feed under that statute absent the language of the contract, and the magistrate judge's oral decision does not indicate that he intended to so hold. Indeed, such a holding would have made no sense since NSS' rights derived from that contract and in its absence NSS would not have had any rights at

all. In any event, the most TW could argue is that his decision is unclear on that point.

Moreover, since TW did not even argue for such a holding in that prior lawsuit, NSS did not have a full and fair opportunity to litigate the issue. Furthermore, there is not even close to an identity of issues between that case and this case because NSS' contract in this case is diametrically different from the one in the prior proceeding: the contract here expressly grants NSS the right to pursue piracy claims with respect to all "unauthorized use and exhibition of the telecast," does not distinguish between HBO and CCTV telecasts and does not derive from TW itself. Accordingly, collateral estoppel would be inappropriate here even if, as TW now argues, clear alternative grounds for a trial court decision could be a basis for estoppel as to both grounds.

Beyond that, the "conflict" in the Circuits is on its way to disappearing as most Circuits have already adopted the modern Restatement rule which is correct and consistent with the Sixth Circuit's decision here. Because the only cases cited by TW in support of its contrary position are outdated, dicta, or unpublished decisions, no meaningful conflict exists.

TW's second issue, that it cannot be liable to NSS under 47 U.S.C. § 605, also does not warrant the Court's review. Once again, TW misstates the issue. While TW asserts that it mistransmitted "an entirely separate satellite feed" (TW's petition for writ of certiorari ("P") 3), to a commercial establishment to which NSS was authorized to transmit a communication of the boxing match but TW was not, in fact the signals that NSS and TW received in their respective Ohio facilities both originated from the same initial transmission of the communication, as the Sixth Circuit found below. (Petitioner's Appendix ("PA") 3a). Moreover, the application of § 605 in NSS' favor by the

Sixth Circuit and the district court below are entirely correct and consistent with the language of that statute, its legislative history, and prior decisions of district courts interpreting and applying that statute. As both courts below found, NSS' suit seeks to redress precisely the type of improper divulging of the content of a communication which Congress intended to remedy in the Communications Act. The absence of any contrary judicial authority or legislative history further establishes that this issue is, at best for TW, not ripe for this Court's review.

COUNTER-STATEMENT OF THE CASE

NSS and TW each obtained certain exclusive rights to transmit the broadcast of a December 1996 boxing match between Riddick Bowe and Andrew Golota. NSS' contract gave it the exclusive right to transmit the communication of the boxing match to commercial establishments in Ohio; TW's contract granted it the exclusive right to transmit the communication on a pay-per-view basis to its Ohio residential customers. However, TW erroneously provided the communication to Melody Lane Lounge, an Ohio commercial establishment, through the TW residential pay-per-view service, for a price substantially lower than NSS charged commercial establishments. TW characterizes its misconduct as merely "inadvertent" -- even though § 605 is a strict liability statute -- but, as the Sixth Circuit found: "Time Warner concedes that Sovacool [the TW employee servicing the Melody Lane Lounge account] should have recognized that the Melody Lane Lounge was a commercial establishment and not a residence. The structure of the building, an exterior identification sign, and neon beer signs in the window made this obvious." (PA 4a).

TW now asserts that NSS received the communication of the match via "an entirely separate satellite feed." (P 3). Actually, as the Sixth Circuit found, "the signals that NSS and Time Warner received in their respective Ohio facilities

both originated from the same initial transmission. . . ." (PA 3a).[1] Moreover, TW is bound by the joint "Stipulations of Undisputed Facts" that "Main Events created one signal consisting of both audio and video content, which was transmitted ... from the venue to the transmission station." (Joint Appendix submitted to the Sixth Circuit ("JA") 388); *see also* 16 Wright & Miller, *Federal Practice & Procedure* § 1527 (1990).

NSS thereafter discovered that Melody Lane Lounge received the transmission of the communication of the boxing match from TW. NSS sued Melody Lane Lounge, its owners and TW for violating 47 U.S.C. § 605 ("the Act"). Melody Lane Lounge and its owners settled with NSS. TW and NSS then cross-moved for summary judgment. The district court entered summary judgment in favor of NSS. Following a bench trial on damages, TW appealed to the Sixth Circuit and argued that: 1) collateral estoppel barred NSS' claim; 2) in the alternative, NSS lacked standing under 47 U.S.C. § 605; and 3) in any event, NSS failed to establish a violation of that statute. The Sixth Circuit affirmed the decision of the district court in favor of NSS.

TW argued below that the magistrate judge's oral grant of summary judgment in a prior lawsuit, *National Satellite Sports, Inc. v. Lyndstalder, Inc. d/b/a/ Coach's Corner*, No. 5:97 CV 2039 (N.D. Ohio July 13, 1998) (*"Coach's Corner"*), should collaterally estop NSS from pursuing this litigation. *Coach's Corner* arose from a fact pattern that is only superficially similar. In *Coach's Corner*, Time Warner

---

[1] TW's disagreement with this and other factual findings is not an appropriate basis for certiorari. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (the Supreme Court is not "a court for correction of errors in fact finding").

Sports ("TWS"), a division of TW, itself granted Joe Hand Promotions limited exclusive rights to distribute closed circuit ("CCTV") telecasts of HBO live boxing events to commercial establishments. Joe Hand sublicensed to NSS the right to sell CCTV telecasts of several fights to commercial establishments in various states, including Ohio, and a boxing match between Evander Holyfield and Bobby Czyz. TW retained the exclusive right to distribute the communication of that match to its residential customers through its HBO service. However, TW provided HBO service of the fight to Coach's Corner, a commercial establishment in Ohio. NSS sued TW under 47 U.S.C. § 605.

The *Coach's Corner* litigation turned on NSS' standing under the particular terms of the governing contract between TWS and Joe Hand. The contract dealt differently with the CCTV telecasts and TW's own HBO telecasts. With respect to the former, it barred Joe Hand from "commenc[ing] or settl[ing] any claim or litigation arising out of [any] alleged piracy, use or proposed use of the CCTV telecast of the Events" without notifying TWS and giving it and HBO the opportunity to be involved in resolving the claim. (JA 263). With respect to the latter, the contract absolutely barred piracy litigation: "Neither you nor your sublicensees shall have any right to act on behalf of either TWS or HBO or to commence or settle any claim or litigation regarding the HBO feed, signal or telecast." (JA 263). TW argued in its summary judgment motion: "NSS's proprietary interest is defined by the agreements which grant the interest. The interest granted to NSS includes certain rights and excludes other rights. One of the rights excluded is NSS's ability to sue for cable television piracy." (JA 254). TW's reply brief also centered its standing argument on the particular terms of the governing contract, citing contractual language that NSS did not "have any right . . . to commence or settle any claim or litigation regarding the HBO feed, signal or telecast." (JA

296). TW reiterated this contractual argument in its point entitled "Plaintiff is Not a 'Person Aggrieved' Under § 605": "the undisputed fact that Coach's Corner received the signal carrying the Event from TWE [TW] *considered in light of the plain terms of the TVLA* [the TWS-Joe Hand agreement], mandates this Court's finding that plaintiff has NO rights to suit for the alleged interception." (JA 296-297) (emphasis added, capitals in original).

At oral argument TW again emphasized that NSS "was granted whatever rights it has pursuant to contract. And as a result of those contracts, *whatever standing it has to sue for those proprietary rights it derived from the contracts themselves*. . . . It's clear by each of the contracts that are relevant to this transfer of rights that National Satellite Sports has no rights and it never did." (JA 95) (emphasis added). Counsel concluded his argument by again noting "the very explicit language that licensees and sublicensees had no right to pursue any type of action to the HBO feed and that National Satellite Sports had no right to pursue any action founded in piracy for any of the feeds." (JA 97). In short, TW never even argued that NSS would not be an "aggrieved person" under 47 U.S.C. § 605(d)(6) even in the absence of the limitations in the governing contract.

The *Coach's Corner* magistrate judge orally granted TW's motion for summary judgment from the bench. He explained: "I view this decision as expressly limited to the facts and circumstances presented in this case." (PA 64a). "[NSS'] effort to overcome the language of the contract does not create a material fact for trial." (PA 65a). The magistrate judge then spent the equivalent of three transcribed pages analyzing the terms of the contract. Turning to § 605, he followed the definition of a "person aggrieved" with just two sentences. In the first, he found, obviously based on the contract, "In this case, I don't think there is any dispute that the communication at issue was the HBO network feed and not the closed circuit television

feed which was what . . . National Satellite had an interest in." (PA 66a). The second sentence was his conclusion: "[a]nd based upon that, those undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person." (PA 66a).

The district court in this action granted NSS' motion for summary judgment, and found no merit in TW's arguments that *Coach's Corner* precluded NSS from litigating this case; that NSS was not an "aggrieved" person within the meaning of § 605 and therefore lacked standing; and that NSS could not demonstrate that TW violated the Act. Specifically, the court found that "[d]efendant's assertion that plaintiff's claim is collaterally estopped by a prior determination in another case is not well-taken." (PA 36a). The court reasoned: "[t]he court in that case first concluded, at the summary judgment stage, that National Satellite had failed to state a claim because it had entered into a contract, the terms of which specifically provided that National Satellite had no right to pursue a piracy action." (PA 37a). The "second basis for the holding was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action." (PA 37a). In contrast to *Coach's Corner*, the contract governing NSS' rights in this lawsuit expressly authorized NSS "to monitor and/or police for unauthorized use and exhibition of the telecast within its territory and to seek legal redress for any damages that it may suffer as a result of said unauthorized use" and did not restrict NSS' rights to its own CCTV telecasts. (JA 135). The court also found that TW failed to show that there was a "full and fair opportunity" in *Coach's Corner* to litigate the issue of whether NSS would have lacked standing under § 605 even absent the language of the TWS-Joe Hand contract, as would be required for collateral estoppel. (PA 38a). The court observed that "[d]efendant points to nothing in the record to support [its] conclusion" that there was a full and fair opportunity. "This hardly satisfies defendant's burden of demonstrating

to the Court that there was such a 'full and fair opportunity to litigate' the issue." (PA 38a). The district court also squarely rejected TW's arguments for an overly narrow construction of § 605. (PA 39a). Finally, the court found TW was liable to NSS under § 605(a) because "[t]here can . . . be a violation of § 605(a) in the context of a cable television communication even if the violator receives a communication signal that it is legally entitled to receive, if it then diverts or sends the communication to an entity that is not entitled to the communication." (PA 39a-40a). The district court awarded NSS statutory damages, together with costs and attorneys' fees, for this violation of § 605.

The Sixth Circuit affirmed on all three grounds. With respect to collateral estoppel, the Court of Appeals extensively reviewed both the factual issues and the language of the oral ruling in *Coach's Corner*. TW argued that the magistrate judge's decision in *Coach's Corner* was based on two alternative, but independent grounds, and that the Sixth Circuit should follow an out-dated "rule" that in such circumstances collateral estoppel attaches to both grounds of the trial court's decision. However, the Sixth Circuit reasoned that in light of the particular circumstances of that oral ruling, it was not "necessary to fully resolve this issue [of whether the modern Restatement rule is the better rule] at the present time." (PA 13a). The court emphasized that the "oral ruling in *Coach's Corner* transcribes into only a two-paragraph conclusory statement regarding NSS's claim under § 605, which was far overshadowed by the balance of its three-page discussion outlining the contractual obstacles that prevented NSS from suing TW." (PA 13a). The court concluded that the "*Coach's Corner's* secondary holding that NSS failed to state a claim under § 605 was thus not necessary to the granting of TW's motion for summary judgment." (PA 13a). Accordingly, "NSS is not bound by the decision in *Coach's Corner*." (PA 15a).

On the § 605 issues, the Sixth Circuit extensively analyzed the language of the statute, the legislative history, and the applicable caselaw. The court concluded: "we find no merit in Time Warner's argument that NSS does not have standing to sue under § 605." (PA 21a). The district court's interpretation [of standing under § 605] is consistent with the legislative history of § 605(d)." (PA 17a). Moreover, "[l]imiting the availability of civil actions ... is inconsistent with the intent of Congress as expressed in the [1984 and 1988 amendments] . . . Both [amendments] were intended to expand the scope of protection provided by the Communications Act, not limit it." (PA 18a). The court also held that § 605 "protects both the transmission and its contents," and that TW and NSS "had proprietary interests in the *transmission* of the *content* of the boxing match." (PA 23a). TW violated § 605(a) by divulging the communication through an electronic channel to an entity other than the addressee intended by the sender. (PA 26a-27a).

REASONS FOR DENYING THE WRIT

I. *Coach's Corner* does not estop NSS from pursuing this litigation.

This case hinges on unique factual circumstances which make it an inappropriate vehicle to address the question TW seeks to raise of whether a trial court decision based on two alternative holdings should be given preclusive effect as to both. TW contends that an alternative ground for the magistrate judge's oral grant of summary judgment in *Coach's Corner* was that NSS was not a "person aggrieved" within the meaning of 47 U.S.C. § 605(a) even if one were to ignore the terms of the governing contract which denied NSS the right to pursue the piracy claim at issue. TW cannot meet its burden to show that there was, and it is inconceivable that the magistrate judge intended to make, such an independent, alternative ruling, particularly when

that issue was never even raised before that court. Moreover, TW cannot satisfy two of the other prerequisites for collateral estoppel -- an identity of issues and a full and fair opportunity to be heard. Even if one were to disregard these dispositive deficiencies in TW's argument, this case would be inappropriate for certiorari because there is no reason to depart from the Sixth Circuit's well-reasoned decision that collateral estoppel does not bar this litigation. There is little conflict on the issue of the preclusive effect of a prior trial court decision where that decision rests on two independent, alternative grounds. Rather, the clear trend is to follow the modern Restatement rule which is consistent with the decision in this case. The only Circuit cases citing the old, contrary rule do so in dicta, or are outdated or unpublished decisions. Accordingly, this Court should deny TW's petition.

1. "The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (internal quotations omitted); *see also* 1B James W. Moore, *Moore's Federal Practice* .443[5-.1] (the issue for which estoppel is sought must clearly have been necessary to the prior judgment). TW cannot meet that burden here.

It is inconceivable that the magistrate judge held or intended to hold that NSS lacked standing under the statute irrespective of the language of the governing contract, much less that any such holding was necessary to the outcome of *Coach's Corner*. Indeed, since NSS' rights derived from that contract, such a holding would have been nonsensical. The magistrate judge found that "[NSS'] effort to overcome the language of the contract does not create a material issue of fact for trial" because NSS was governed by a contract which expressly provided that NSS had no right to pursue a piracy action with respect to the HBO feed. (PA 65a). Although the magistrate judge did say that

there was a second ground for his decision -- namely the language of § 605 -- his statutory ruling was also based on the specific terms of that contract. Thus, his statement that "there is [not] any dispute that the communication at issue was the HBO network feed and not the closed circuit television feed which was what Joe Hand and then subsequently National Satellite had an interest in" is drawn directly from the contract. The magistrate judge's next sentence that, "based upon that, these undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person," is therefore also clearly based on the language of the contract. The magistrate judge never intimated that absent the limiting language in that contract, NSS would still have lacked standing to sue under § 605. TW never even presented that position to the magistrate judge, either in its briefs or at oral argument.

Moreover, the district court below correctly held that TW "has not demonstrated, as it must, that the determination of this particular issue was essential to the [prior] judgment." The "second basis for the holding [standing under the statute] was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action." (PA 37a). Since the only basis for the magistrate judge's decision that is clear is that NSS lacked standing under the particular terms of the applicable contract, TW has failed to meet its burden of showing that the *Coach's Corner* judge made an independent, alternative holding with respect to standing under the statute that would be applicable in the circumstances of this case.

2. TW has also failed to meet its burden of establishing an identity of issues, which is another basic prerequisite of collateral estoppel. *Coach's Corner* did not raise the same issues as are present here, because it involved a different contract which expressly precluded NSS from suing for any communication of the HBO telecast, which was the

communication at issue, while here the contract expressly authorizes NSS to sue concerning any piracy or unauthorized use or exhibition of the telecast within its territory. Thus, there is no basis for TW's glib statement that the only difference between *Coach's Corner* and this case is supposedly that they involve a different boxing match and a different bar. (P 6-7). TW only briefly refers to the critical difference in the two contracts, in a cursory footnote. (P 7 n.2). However, "[i]f particular issues in the two suits differ in any significant way, a prior determination of one is simply irrelevant to a later determination of the other." *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 519 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975). *Coach's Corner* decided only that under the contract applicable in that case, NSS did not have the right to assert a claim with respect to the improper transmission of the HBO telecast at issue in that litigation. Accordingly, TW has failed to establish that *Coach's Corner* involved an identity of issues.[2]

3. TW has not met its burden of establishing that NSS had a "full and fair opportunity" to litigate in *Coach's Corner* whether it would have had standing to sue under 47 U.S.C. § 605(a) in the absence of the contractual prohibition applicable in that case. "[T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard," and thus must pass muster "procedurally, substantively, and evidentially." *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313,

---

[2] The Sixth Circuit below did not address the significant difference in the contracts in its erroneous finding on the identity of issues prong of the collateral estoppel test.

329, 333 (1971). "[T]he application of collateral estoppel has been narrowly tailored to ensure that it applies only where the circumstances indicate the issue estopped from further consideration was thoroughly explored in the prior proceeding." *Johnson v. Watkins*, 101 F.3d 792, 795 (2d Cir. 1996).

Here, the issue of standing under § 605 irrespective of the TWS-Joe Hand contract was never even presented by TW in *Coach's Corner*, much less "thoroughly explored" in that proceeding. TW never argued that NSS would not have had an interest in the communication of the HBO feed to a commercial establishment irrespective of the contract. To the contrary, TW's briefs in *Coach's Corner* focused on the particular terms of the contract: "NSS's proprietary interest is defined by the agreements which grant the interest. The interest granted to NSS includes certain rights and excludes other rights. One of the rights excluded is NSS's ability to sue for cable television piracy." (JA 254). NSS responded to those arguments that "the first step in the process of determining whether a party has rights to commence an action is to refer to the language employed in the agreements between the parties." (JA 157). NSS similarly framed its arguments on standing under § 605 in terms of its contractual rights, contending that the issue was "whether a contractual clause imposing a condition must be satisfied in order to deny standing." (JA 156). At oral argument, TW similarly focused on the TWS-Joe Hand contract, asserting that NSS had "whatever rights it has pursuant to contract. And as a result of those contracts, whatever standing it has to sue for those proprietary rights it derived from the contracts themselves." (JA 95). As the district court correctly held, TW "points to nothing in the

record to support this conclusion [that NSS had a full and fair opportunity]." (PA 38a).[3]

Accordingly, TW cannot establish three of the four prerequisites for collateral estoppel, any one of which would be a sufficient independent basis to support the finding that collateral estoppel did not preclude NSS from pursuing this litigation.

4. Only if TW could establish an identity of issues, a full and fair opportunity to litigate them in the prior proceeding, and an alternative and independent holding that was necessary for the prior decision could TW reach the question it now seeks to present to this Court. Even then, however, certiorari should be denied because the Sixth Circuit's denial of estoppel was correct and consistent with the clear trend among the Circuits to follow the modern rule, as set forth in the Restatement (Second) Judgments § 27 (comment i). The Restatement provides that, with respect to trial court judgments: "[i]f a judgment . . . is based on determination of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) Judgments § 27 (cmt. i). At least seven other Circuits follow this modern rule.[4] The Seventh Circuit characterized this

---

[3] The Sixth Circuit erroneously disagreed with the district court's determination that the full and fair opportunity prong was not met.

[4] *See, e.g., Arab African Int'l Bank v. Epstein,* 958 F.2d 532, 535 (3d Cir. 1992), *rev'd on other grounds,* 10 F.3d 168 (3d Cir. 1993); *Ritter v. Mount St. Mary's College,* 814 F.2d 986, 993 (4th Cir. 1987); *Hicks v. Quaker Oats Co.,* 662 F.2d 1158, 1166-67 (5th Cir. 1981); *Peabody Coal Co. v. Spese,* 117 F.3d 1001, 1008 (7th Cir. 1997) (*en banc*); *Baker Elec. Co-op v. Chaske,* 28 F.3d 1466, 1475-76 (8th Cir. 1994); *Turney v. O'Toole,* 898 F.2d 1470, 1472 n.1 (10th Cir. 1990);

modern Restatement rule as the "general rule on issue preclusion." *Schwager v. Fallas (In re Schwager)*, 121 F.3d at 177, 183 (5th Cir. 1997).

The contrary rule advocated by TW would waste judicial resources by promoting frivolous and unnecessary appeals in cases where a party recognizes that one independent ground for a trial court decision is correct, even though a second ground may be erroneous. *See, e.g.*, Restatement (Second) Judgments § 27 (comment i) (a contrary rule "might be responsible for increasing the burdens of litigation of the parties and the courts rather than lightening those burdens").[5] This case illustrates the absurd potential consequences of TW's proposal. TW's rule would have forced NSS to pursue an entirely useless appeal in *Coach's Corner* on an issue (whether it would have had standing absent the contractual limitation on its right to pursue piracy claims) that was not even clearly an alternative ground for the magistrate judge's decision, solely to protect itself against possible future collateral estoppel consequences, even though, in the words of the Sixth Circuit, "while [NSS] might have won the 'battle' over § 605, NSS would almost surely have lost the 'war' in being unable to overcome the contractual prohibition on commencing litigation against Time Warner." (PA 12a-13a). TW concedes this outcome: "It is true that, if one of

---

Comair Rotron, Inc. v. Nippon Densan Corp., 49 F.3d 1535, 1538 (Fed. Cir. 1995).

[5] TW's only support for its wholly speculative argument that "the expense in terms of judicial economy is markedly lower" under its proposed rule than under the modern Restatement rule, is an article which fails to cite any empirical evidence or any other authority to support its conclusory assertion. (P 16).

the alternative grounds is unassailable, an appellant is unlikely to obtain a reversal." (P 16).

The New York Court of Appeals aptly explained why it would be ludicrous to require an appeal under these circumstances: "it would be . . . fundamentally unfair to give preclusive effect to a determination where the only incentive to litigate stems from its potential collateral effects. Such a ruling would ill serve the litigation-limiting purposes of collateral estoppel; it would simply encourage overlitigation at an earlier stage." *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 527 N.E.2d 754, 757 (N.Y. 1988). Indeed, such an appeal would likely draw sanctions under Fed. R. App. P. 38. That is exactly what happened in *Nagle v. Alspach*, 8 F.3d 141 (3d Cir. 1993), where the Third Circuit imposed sanctions under Rule 38 on appellants who challenged only two of the four conclusions relied on by the district court to support its grant of summary judgment. Because the lower court judgment would be affirmed even if the Court of Appeals held for the appellant on both of the appealed grounds, the Third Circuit found that "[t]his appeal therefore never had any possibility of resulting in a reversal and is frivolous." *Id.* at 145. Moreover, because even a finding for the appellant on such an alternative ground would have no effect on the ultimate outcome of the case, the filing of such an appeal would be tantamount to seeking an impermissible advisory opinion. *See Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). This shows that it is nonsense for TW to argue that "preclusion cannot be withheld on the theory that it is unfair to bind the losing litigant to a holding that, in the presence of an unassailable alternative holding, cannot successfully be appealed. Alternative grounds *can* be appealed, and a losing litigant has every incentive to do so." (P 2).

The concern that alternative holdings do not necessarily reflect the same thoughtful consideration further militates

in favor of the modern Restatement rule. Once again, this case provides a persuasive illustration of this fact. The magistrate judge in *Coach's Corner* devoted a mere three sentences of his oral opinion to the statutory standing issue, and he received no briefing or oral argument on the issue. If he intended to give an advisory opinion as to whether NSS would have had standing absent the applicable contractual restrictions, he certainly did not say so clearly.

Rather than directly address these important issues, TW attempts to draw an analogy between collateral estoppel and *stare decisis*. However, the Supreme Court and Circuit caselaw relied upon by TW rest on a crucial distinction between an alternative decision of the Supreme Court or an appellate court, and that of a trial court, a distinction TW glosses over.[6] Those cases merely support the Restatement's companion to the rule at issue here. The Restatement provides that alternative holdings of an appellate court are entitled to preclusive effect, while those of a trial court are not. *Compare* Restatement (Second) Judgments § 27 comment o *with* comment i. This

---

[6] For instance, the one circuit case cited by TW to support its contention that *stare decisis* applies to alternative holdings specifically limits the application of that rule to holdings by an appellate court. *Natural Res. Def. Council v. NRC*, 216 F.3d 1180, 1189 (D.C. Cir. 2000). Similarly, the case upon which TW relies to suggest a general proposition that *stare decisis* applies as much to secondary holdings as to primary holdings arises in the context of the Supreme Court, not a trial court. *See Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 342 (1928). Courts have emphasized the importance of the holdings of this Court: "even if the [Supreme] Court's reliance on two independent grounds rendered each dictum, we would still be bound by its interpretation ... since carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Natural Res. Def. Council*, 216 F.3d at 1189 (internal quotations omitted).

distinction is supported by a sound policy rationale. The primary reason for the rule with respect to *trial* court determinations is the concern about encouraging frivolous appeals. In contrast, because certiorari is granted by this Court only rarely and in particularly compelling cases, a circuit court is generally effectively the court of final decision, thereby minimizing policy concerns about encouraging unnecessary appeals from decisions of that court.

5. Another independent reason for denying the writ is that although TW attempts to point to a conflict in the Circuits, the overwhelming trend in the circuit courts is to follow the modern Restatement rule. The Third, Fourth, Fifth, Seventh, Eighth, Tenth and Federal Circuits follow this rule, whereas TW argues that only three Circuits (the D.C., Second and Ninth) follow the out-dated rule. (P 12). However, the decisions cited by TW do not evidence any meaningful conflict, are easily distinguishable from this case and in some cases may not remain good law.

For example, the Ninth Circuit decisions relied on by TW fail to support its argument that there is a meaningful conflict. *In re Westgate-Cal. Corp.*, 642 F.2d 1174 (9th Cir. 1981), was decided prior to the publication of the Second Restatement of Judgments in 1982, which takes a position on this issue that is contrary to that of the First Restatement. Moreover, the Ninth Circuit's cursory decision does not explain the reasoning for its choice of a collateral estoppel rule, but merely asserts that it is following the "established rule," based on a citation to an earlier version of *Moore's Federal Practice*. 642 F.2d at 1176-77. However, as the Sixth Circuit noted below, the current version of *Moore's Federal Practice* "describes the [Second] Restatement's view as the 'new' and 'modern' rule." (PA 12a). The only other support TW cites for its contention that the Ninth Circuit continues to follow the old rule is *Bank of Guam v. Wiseman*, No. 87-1799, 1990

WL 140521, at *2 (9th Cir. Sept. 27, 1990) (unpublished), an *unpublished* decision which, pursuant to Local Circuit Rule 36-3(a), is "not binding precedent." *See also Territory of Guam v. Borja*, 983 F.2d 914, 917 (9th Cir. 1992), *amended* (Jan. 20, 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 946 (7th Cir. 1993).[7]

The District of Columbia Circuit's decision in *Yamaha Corp. of America v. United States*, 961 F.2d 245 (D.C. Cir. 1992), does not establish any meaningful conflict. *Yamaha* involved a completely different collateral estoppel issue. There, in the prior litigation, the Ninth Circuit affirmed the district court's decision based on only one of the two alternative grounds for the lower court decision. The District of Columbia Circuit thus addressed the applicability of collateral estoppel only where two alternate grounds are appealed and the appellate court ruled only on one of them. This situation is addressed in a completely different section of the Restatement (Second) Judgments. *Compare* § 27 comment o, which is entitled "Effect of an appeal," *with* comment i entitled "Alternative determinations by court of first instance." Accordingly, *Yamaha*'s statement concerning the collateral estoppel rule at issue here was merely *dicta*, and had no bearing on any of the issues actually before that court.

Nor does the Second Circuit case law cited by TW show that that Circuit follows a conflicting rule. TW relies on three Second Circuit cases. *Irving Nat'l Bank v. Law*, 10 F.2d 721 (2d Cir. 1926), was decided nearly eighty years ago, and since then, the Second Circuit has followed the

---

[7] The Ninth Circuit's rule also prohibits citation of an unpublished decision to any of the courts of that Circuit.

contrary modern rule. *See, e.g., Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970). *Williams v. Ward*, 556 F.2d 1143 (2d Cir. 1977), recognized that the conclusion in *Halpern*, which was subsequently codified in the modern Restatement rule, that "'an issue not essential to the prior judgment may not have been afforded the careful deliberation and analysis normally applied to essential issues' is a real one in some circumstances," but held that under the particular facts of *Williams* such a concern did not exist. *Id.* at 1154. The third Second Circuit case relied on by TW also does not show a meaningful conflict. Like *Yamaha*, *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38 (2d Cir. 1986), addressed a completely different issue of the application of collateral estoppel where there was an appeal in the prior litigation. The Second Circuit defined the collateral estoppel issue as follows: "We must therefore determine the collateral estoppel effect of an adverse District Court finding that was explicitly not reviewed but was necessary to a conviction that was said to have been affirmed." *Gelb*, 798 F.2d at 44. Accordingly, any statement about the collateral estoppel effect of an unappealed decision resting on two alternative grounds was *dicta*.

In short, contrary to TW's contention that there is a complete split of authority, there is an overwhelming trend towards the modern Restatement rule, with only dicta and out-dated or unpublished Circuit decisions supporting the prior rule.[8]

---

[8] TW cites commentators who it claims are "likewise in disagreement" with the modern rule. (P 13 & n.5). For example, TW compares Restatement (Second) Judgments § 27 cmt. i (1982) with the *First* Restatement, which took a contrary view. But this merely shows that the authors of the Restatement have changed their position to

6. TW attempts to bolster its "conflict" argument by claiming that the Sixth Circuit actually created a new approach. That argument is belied by the decision itself. The Sixth Circuit did not say that it was creating a new rule of collateral estoppel. To the contrary, the court stated that "[w]e find NSS's point persuasive," based on the reasoning of the Restatement and the many other Circuits following that rule. (PA 12a).[9]

II. The Sixth Circuit correctly applied the plain language of § 605, and its holding is entirely consistent with both the legislative history and the caselaw on § 605.

The Court of Appeals below correctly found that NSS had standing in this action to sue as a "person aggrieved" under § 605, that TW is liable for violating that section, and that the type of improper divulging of the content of a communication in which TW engaged is precisely what Congress intended to remedy when it enacted the Communications Act. The clear language of the Communications Act, together with its legislative history and the caselaw interpreting § 605 mandate the holdings

---

the one adopted by most courts. TW similarly cites a 1942 article written by one of the reporters of the First Restatement, but that article has no bearing on NSS' position that sixty years later, courts have adopted the Second Restatement rule.

[9] In any event, TW's contention that a primary/secondary distinction rule is unworkable because it is not clear ignores the reality of many decisions. It is well-settled that only holdings, and not *dicta*, are binding precedent. Thus, courts and parties regularly examine court decisions to determine the actual holding versus mere *dicta*, despite the fact that in many cases, it is not entirely clear what is a holding versus *dicta*. TW does not cite any evidence that distinguishing a primary ground from a secondary ground would be any more difficult.

below and there are no cases nor any legislative history that are inconsistent with these holdings. They do not raise any issues meriting this Court's review.

1. NSS is a "person aggrieved" and had standing to sue TW under §§ 605(e)(3)(A) and 605(d)(6) whether or not NSS had a proprietary interest in the communication that TW divulged to Melody Lane Lounge. In any event, NSS did have a proprietary interest and the communication was intercepted within the meaning of the statute.

Congress designed the Communications Act to provide "both prosecutors and civil plaintiffs [with] the legal tools they need to bring piracy under control." P.L. 100-67, *Trademark Law Revision Act of 1988 - Satellite Home Viewer Act of 1988*, H.R. Rep. No. 887(11), *1988 U.S. Code Cong. & Admin. News* 5577, 5658. Congress amended the statute in 1984 and 1988 to further deter theft of cable service. The 1984 amendments added to § 605 subsections (b)-(e) to address "a problem which is increasingly plaguing the cable industry - the theft of cable service." *Cable Communications Policy Act of 1984*, H.R. Rep. No. 98-934, *1984 U.S. Code Cong. & Admin. News* 4655, 4720. This piracy threatened legitimate satellite dealers and programmers who would otherwise receive payments for their programming. *1984 U.S. Code Cong. & Admin. News* at 4702. As amended, § 605(e)(3)(A) of the Act provides that "[a]ny person aggrieved by any violation of subsection (a) . . . or paragraph (4) may bring a civil action in a United States district court." Section 605(d)(6) defines the term "any person aggrieved" as follows:

> the term 'any person aggrieved' *shall include* any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection

> (e) of this section shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming. (emphasis added).

TW argued below that the 1984 and 1988 amendments adding § 605(d)(6) to the Act supposedly somehow *narrowed* the class of persons with standing to sue under § 605(e)(3)(A), an argument the Sixth Circuit squarely rejected because it "flies in the face of Congress's explicit interest in 'expanding standing to sue' under the Act." (PA 18a) TW appears to back away from this argument in its petition and now concedes that the purpose of the 1988 amendment was to expand standing by making clear that it included wholesale or retail distributors of satellite cable programming. (P 21 n.14).

Nevertheless, TW continues to argue that the statutory language "any person aggrieved" does not mean what it says.[10] TW cites cases applying other statutes with similar language (P 21-23), but none of them requires a different decision here. The language of § 605, together with the caselaw and legislative history of *this* Act make clear that the Sixth Circuit and the district court below properly rejected TW's argument that NSS lacked standing and that TW was not liable.

---

[10] TW's convoluted argument that "standing is appropriate only for parties with a reasonable expectation to that effect" (P 23), is circular. Both courts below found that NSS has standing under the clear language of the statute and that the statute was designed to protect NSS from this type of piracy. Accordingly, NSS certainly would have a reasonable expectation of having standing under the Act.

As the Sixth Circuit found, the legislative history of the 1988 amendment states that one of its purposes is "expanding standing to sue." (PA 18a). The Sixth Circuit had "previously recognized Congress's intent to expand rather than contract the reach of the Communications Act when it amended § 605." (PA 19a). Other courts, too, have found that this legislative history mandates a broad interpretation of standing. *See, e.g., MediaOne, Inc. v. E&A Beepers & Cellulars*, 43 F. Supp. 2d 1348, 1353 (S.D. Fla. 1998). There is absolutely no evidence that Congress intended to narrow standing by adding § 605(d)(6).

TW's interpretation of "any person aggrieved" is also refuted by the statutory language itself, for at least four reasons. First, as the Sixth Circuit held, the term "include" in the statute is not exclusive as a matter of plain language. (PA 17a)("[t]he district court held that the use of the word 'include' in the statutory phrase 'any person aggrieved shall *include* any person . . .' does not mean that *only* persons who meet that definition have standing to sue. We agree."); *accord General Instrument Corp. v. Nu-Tek Elecs. Mfg., Inc.*, No. 93-CV-3854, 1996 WL 442790, at *5 (E.D. Pa. July 31, 1996), *aff'd*, 197 F.3d 83 (3d Cir. 1999).

Second, by TW's logic *only* wholesale or retail distributors of satellite cable programming could sue. That would be an absurd result since § 605(6) covers all wire or radio communications. *See, e.g., Joe Hand Promotions v. Rennard St. Enters.*, 975 F. Supp. 746, 752 (E.D. Pa. 1997). Moreover, if TW's interpretation were correct, then the only persons with standing to sue for violation of § 605(e)(4) would be persons "engaged in the lawful manufacture, distribution or sale of equipment necessary to authorize or receive satellite cable programming." But TW itself, although not falling within that category, has sued under § 605(e)(4), arguing that it was a "person aggrieved," and obtained relief. *See Time Warner Cable v. Freedom Elecs.*, 897 F. Supp. 1454, 1459 (S.D. Fla. 1995). Accordingly,

TW should be judicially estopped from taking a different position now.

Third, TW concedes that § 605(d)(6) affords standing "to entities seeking to combat unauthorized interceptors' acts of communications piracy." (P 25). Here, TW was not authorized to divulge the contents of the communication to Melody Lane Lounge under the clear language of 47 U.S.C. § 605(a). TW was not free (or, in the language of the statute, it did not have an authorized channel of transmission) to divulge the contents to everyone in its cable system.[11]

Fourth, even if this Court were to adopt TW's construction of § 605(d)(6), NSS would still have standing because it had a proprietary interest in the communication, as the Sixth Circuit found. (PA 23a). NSS is not a "stranger" that had only "some indirect economic interest in the communication's content." (P 24). Rather, NSS had a proprietary interest in the communication of the content of the boxing event to commercial establishments in Ohio. That right is of significant economic value to NSS, as the district court below found: "[p]iracy of programming poses

---

[11] It is ironic that TW which has extensively used this statute and the cable piracy statute to prosecute others objects that NSS has been forced to utilize the statute to protect its interests. *See, e.g., Time Warner v. M.D. Electronics, Inc.*, 101 F.3d 278 (2d Cir. 1996); *Time Warner v. Googies Luncheonette, Inc.*, 77 F. Supp.2d 485 (S.D.N.Y. 1999); *Time Warner Cable v. Taco Rapido Restaurant*, 988 F. Supp. 107 (E.D.N.Y. 1999); *Time Warner Entertainment v. Worldwide Electronics, L.C.*, 50 F. Supp.2d 1288 (S.D. Fla. 1999). Indeed, the proliferation of lawsuits filed bears witness to the extensive problems which NSS faces as a result of piracy and why courts must use the full power of this statute to deter and prevent any and all forms of intercepted or misdirected communications.

a serious threat to the business interests of National [Satellite Sports], whose income depends primarily on its status as an exclusive licensee. Piracy also poses a threat to the goodwill of National's customers, who are less willing to pay for services if their competition is able to get them free through piracy." (PA 51a). *See also Joe Hand Promotions v. Rennard Street Enterprise,* 975 F. Supp. at 752. Moreover, the communication was "intercepted" within the meaning of the statute.

Other courts have found that plaintiffs with similar claims have standing. *See, e.g., Joe Hand Promotions v. Rennard Street Enterprise,* 975 F. Supp. at 753 ("plaintiff is an aggrieved person for purposes of Section 605, because it has a proprietary right to the distribution of the HBO broadcast. Therefore, if it can prove that the defendant received the boxing matches directly from the satellite, rather than the coaxial cable network, the plaintiff has standing to sue under Section 605."); *Television Signal Corp. v. Chapman,* No. C92-3732, 1993 WL 69179, at *2 (N.D. Cal. Mar. 3, 1993) ("Viacom clearly has standing to bring suit as a 'person aggrieved.' . . . by its . . . . licensing agreements, Viacom acquired the exclusive rights to telecast Fight No. 1 and Fight No. 2 in the Northern California area [through HBO and pay-per-view]. . . . Viacom would certainly have standing to bring suit for any unauthorized interception of the fight in this area").[12]

---

[12] To the extent that TW suggests that its "inadvertent" conduct should not render it liable, such an argument is inapplicable because, as noted, TW was at fault. Moreover, Section 605 is a strict liability statute. TW itself has benefited from this. *See, e.g., Time Warner Cable v. Taco Rapido Rest.,* 988 F. Supp. 107, 111 (E.D.N.Y. 1997). In any event, TW cannot plausibly contend that it was innocent given that the installer had been in the bar and seen that it clearly

2. The courts below also correctly found that TW violated § 605(a) when it transmitted the communication of the event to an entity to which TW was not authorized to transmit it. The Act does not exempt from liability entities, such as TW, that are authorized to transmit the communication to some recipients, if they do so to others.

TW's argument to the contrary rests on a single unsupported assertion: that Congress could not have intended NSS to "be within the zone of interests protected by the first sentence of Section 605(a), simply because [it has] some indirect economic interest in the communication's content." (P 24). That speculation is baseless. Moreover, NSS' economic interest in the communication's content is not indirect. TW apparently disagrees (P 23-24) with the fact finding of the courts below that the signals NSS and TW received in their respective Ohio facilities both originated from the same initial transmission of the communication. That disagreement is not a basis for certiorari.

TW's petition also ignores that, in similar circumstances, other courts have reached consistent interpretations of § 605, even though this caselaw was cited by the Sixth Circuit below. (PA 25a-26a). For example, *Joe Hand Promotions v. D.M.B. Ventures, Inc.*, No. CIV. A. 93-2656, 1995 WL 328399 (E.D. La., May 31, 1995), involved similar facts. There, Cox Cable acquired the right to distribute a boxing match in New Orleans to residential

---

did not appear to be residential. TW was wrong to allow this account to be established and to continue as residential; any wrongful act which resulted cannot be subsumed or excused under a guise of innocence. Similarly, no cable company should be allowed to escape liability for similar acts.

customers by pay-per-view. Joe Hand Promotions had the exclusive right to distribute the match to commercial establishments in New Orleans. Joe Hand discovered that four commercial establishments showed the match without authorization, and sued both the cable company and the commercial establishments under § 605. The court ruled in favor of Joe Hand, and found no basis for the arguments Time Warner attempts to make here. For example, the court disagreed with Cox Cable's contention that cable companies are entitled to an implicit exemption from liability -- which is essentially Time Warner's argument here: 1) the fifth sentences of § 605 (a) and (b) exempt specified persons and communications from the reach of the statute, and cable companies are not among the listed exemptions; 2) § 605(a) applies to persons legitimately receiving, assisting in receiving, transmitting, and assisting in transmitting interstate communications by wire and radio, and courts have "uniformly held" that this includes satellite signals; 3) the legislative history does not even suggest that Congress intended to exempt cable companies; and 4) there is a "strong policy against implied exemptions." *Id.* at **3-4. The court also rejected the cable company's argument -- also advanced by Time Warner here -- that it should escape liability because it did not willfully provide unauthorized programming to a commercial establishment, because "liability under Section 605(a) does not require a showing of intent or specific knowledge. The statute provides that 'no person' shall receive, intercept, or assist in the unauthorized interception of radio and wire communications." *Id.* at *4.

The court in *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995 (D. Md. 1993), similarly found § 605 standing and liability based on another analogous fact pattern. The plaintiff there had purchased the exclusive licensing rights to the live closed circuit television broadcast of a boxing match in commercial establishments; other entities had the exclusive right to broadcast the event

to private, residential cable subscribers on a pay-per-view basis. A commercial establishment showed the broadcast through the residential pay-per-view service. The court granted summary judgment to That's Entertainment, finding a violation of § 605(a). The Court held that "[e]ven assuming, as these defendants contend, that there was no 'interception' here because [the bar] was 'authorized' by [the residential distributor] to receive the Event on a pay-per-view basis, defendants still have violated the Act because they clearly were not authorized to broadcast the Event to the patrons of a commercial establishment . . . [§ 605(a)] clearly proscribe[s] the unauthorized divulgence or use of communications which have been 'received' legally for certain purposes." *Id.* at 999.

Accordingly, the clear statutory language, legislative history, and caselaw interpreting and applying § 605, all support the decisions of the Sixth Circuit and the district court below.

3. TW erroneously labels the Sixth Circuit's decision "unprecedented" (P 18), in an attempt to obscure the fact that this issue is simply not appropriate or ripe for this Court's review.[13] As discussed above, TW simply ignores

---

[13] TW's contention that this is properly a state law contract claim is similarly unavailing. NSS did not have a contract with TW. TW would have promptly moved to dismiss any lawsuit premised on a theory that NSS was somehow an intended third party beneficiary of TW's contract to license the event to its residential customers via pay-per-view and was thus liable for improperly transmitting it to a customer outside the scope of its contract. TW does not cite any caselaw in support of its contention that this should be a contract issue. Moreover, even if a state law claim existed, the Communications Act was designed to protect against the wrongful use of a communication and gives NSS a cause of action against TW here.

that other courts have, on similar fact patterns, reached consistent interpretations of § 605, and have found liability in these situations. The fact that the Sixth Circuit expressly followed this precedent is hardly cause for this Court's review. Indeed, TW does not and could not point to any conflict on these issues, rendering the issues, at best for TW, premature for this Court's review.[14] Because the decisions below were correct, there is no conflict among courts and the issues involved here are limited, this Court should deny the writ.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court deny the Petition.

Dated: January 9, 2002

Respectfully submitted,

MARCUS W. CORWIN
SKIP M. KLAUBER
MARCUS W. CORWIN PA
7777 Glades Road, Suite 208
Boca Raton, Florida 33434
(561) 482-3636

MICHAEL J. DELL
Counsel of Record
LAUREN FREEMAN-BOSWORTH
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

---

[14] Although TW cites *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir. 1973), in a footnote, the Sixth Circuit below distinguished its prior decision in *Smith* both because it was decided prior to the 1984 and 1988 statutory amendments and on its facts. (PA 24a).